Supreme Court, U.S.
FILED

97-427 SEP - 3 1997

No.

IN THE
Supreme Court of the United States
OCTOBER TERM 1996

THE NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES AND THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION,

Petitioners,

v.

THE CITY OF LOS ANGELES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARY V. DiCRESCENZO
THE NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES
1201 15th Street, NW
Washington, DC 20005
(202) 822-0359

NICK CAMMAROTA
THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION
1330 South Valley Vista Drive
Diamond Bar, CA 91765
(909) 396-9993

KENNETH B. BLEY*
COX, CASTLE & NICHOLSON LLP
2049 Century Park East, 28th Floor
Los Angeles, CA 90067
(310) 284-2231

**Counsel of Record*

Attorneys for Petitioners
THE NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES AND THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION

38 pp

QUESTION PRESENTED FOR REVIEW

Can a facial attack, alleging unconstitutionality, on a municipal ordinance be barred by a statute of limitations when only prospective relief—declaratory and injunctive—is sought?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	2
OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT OF CERTIORARI	4
A. The Ninth Circuit's Opinion Conflicts With Relevant Decisions Of This Court	4
B. The Ninth Circuit's Opinion Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For This Court's Supervisory Power	6
C. The Ninth Circuit's Opinion Conflicts With The Decision Of Another United States Court Of Appeals On The Same Important Matter	8
D. For Some Reason, The Ninth Circuit Does Not Want To Extend The Same Protection To Real Property That It Does To Other Constitutionally Protected Rights	8
CONCLUSION	10
Appendix A Opinion of the United States Court of Appeals for the Ninth Circuit, entered on June 9, 1997	
Appendix B Los Angeles Municipal Code § 12.37	
Appendix C Complaint, filed September 22, 1995	

TABLE OF AUTHORITIES

	Page(s)
CASES	
Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996)	8
Baker v. Carr, 369 U.S. 186 (1962)	5, 6
Brown v. Board of Education, 347 U.S. 483 (1954)	4, 5, 6
Chicago, I.&L.R.R. v. Hackett, 228 U.S. 581 (1913)	7
Clinton v. Jones, ___ U.S. ___, 117 S.Ct. 1636 (1997)	6
Compassion in Dying v. State of Washington, 49 F.3d 586 (9th Cir. 1995), *rev'd sub nom State of Washington v. Glucksberg,* ___ U.S. ___, 117 S.Ct. 2258 (1997)	9
Davis v. County School Board, 103 F.Supp. 337 (E.D. Va. 1952)	5
Dolan v. City of Tigard, 512 U.S. 374 (1994)	3, 9, 10
Gray v. Sanders, 372 U.S. 368 (1963)	5, 6
Gutowsky v. County of Placer, 108 F.3d 256 (9th Cir. 1997)	9
Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968)	7
Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966)	5, 6
Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)	5-6
Kuhnle Brothers, Inc. v. County of Geauga, 103 F.3d 516 (6th Cir. 1997)	8
Loving v. Commonwealth of Virginia, *388 U.S. 1 (1967)*	4, 6-7

Page(s)

CASES (Cont.)

Macri v. King County,
110 F.3d 1496 (9th Cir. 1997) 8
Patel v. Penman,
103 F.3d 868 (9th Cir. 1996) 8
Reynolds v. Sims,
377 U.S. 533 (1964) 5, 6
Roe v. Wade,
410 U.S. 113 (1973) 4, 6
Sanders v. Gray,
203 F.Supp. 158 (N.D. Ga. 1962) 5, 6
Shelley v. Kramer,
334 U.S. 1 (1948) 7
Sinclair Oil Corp. v. County of Santa Barbara,
96 F.3d 401 (9th Cir. 1986) 8, 9
United States v. James Daniel Good Real Property,
510 U.S. 43 (1993) 9

CONSTITUTION

United States Constitution, Fifth Amendment 2
United States Constitution, Fourteenth
Amendment, § 1 3

STATUTE, MUNICIPAL CODE AND RULES OF COURT

28 U.S.C. § 1254(1) 2
Los Angeles Municipal Code § 12.37 3
Supreme Court Rule 10 4
Supreme Court Rule 13.3 2

No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1996

THE NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES AND THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION,

Petitioners,

v.

THE CITY OF LOS ANGELES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PARTIES TO THE PROCEEDING

The parties to the proceeding in this Court are, and in the United States Court of Appeals for the Ninth Circuit were, the National Association of Home Builders of the United States, the Building Industry Legal Defense Foundation, and the City of Los Angeles.

The National Association of Home Builders of the United States, a not-for-profit corporation, has neither a parent company nor any non-wholly owned subsidiaries.

The Building Industry Legal Defense Foundation, a not-for-profit corporation, is a wholly owned subsidiary of the Building Industry Association of Southern California. The Building Industry Legal Defense Foundation has no non-wholly owned subsidiaries.

OPINION BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is unreported. The opinion is set forth in Appendix A.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was entered on June 9, 1997. This petition for writ of certiorari has been timely filed in accordance with Rule 13.3 of the Rules of this Court. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law;"

Section 12.37 of the Los Angeles Municipal Code is set forth in Appendix B.

STATEMENT OF THE CASE

In 1962, the City of Los Angeles enacted § 12.37 as part of its Municipal Code. Section 12.37 mandates that a person who wants to build any sort of a building or structure on a lot which abuts larger streets must dedicate and improve the street to bring it up to the full width called for in the City's General Plan. (Section 12.37.A) The requirement imposed by § 12.37 does not call for an individualized determination as to whether the amount of the land which must be dedicated to widen a street is roughly proportional to the impact caused by new development as required by this Court's decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

In September, 1995, the National Association of Home Builders of the United States ("NAHB") and the Building Industry Legal Defense ("BILD") Foundation filed an action for declaratory and injunctive relief contending that § 12.37 was unconstitutional because of its failure to comply with the requirements of *Dolan*. A copy of the complaint is set forth in Exhibit C.

The complaint alleged that § 12.37 was invalid on its face and that there was no manner or circumstance in which it could be applied constitutionally. (Complaint, ¶¶ 30 and 31.) The only relief sought was a declaration of its invalidity and an injunction prohibiting its enforcement in the future. (Complaint, prayer for relief, ¶¶ 1 and 2.)

Although the District Court had dismissed the complaint on the basis of standing, the Court of Appeals quickly found

that the NAHB and the BILD Foundation had standing. (Opinion at 1-3.) It then went on to hold that the complaint's facial attack, seeking only prospective relief, was barred by a one year statute of limitations. (Opinion at 5.)

The Court of Appeals recognized that this Court had found statutes unconstitutional scores of years after their enactment but distinguished *Loving v. Commonwealth of Virginia*, 388 U.S. 1 (1967), and *Brown v. Board of Education*, 347 U.S. 483 (1954), as as-applied attacks which did not involve takings claims. (Opinion at 5-6.)

REASONS FOR GRANTING THE WRIT OF CERTIORARI

This case satisfies virtually all of the criteria set out in Rule 10 of the Rules of this Court. Further, if the Ninth Circuit is right in its holding, a failure to attack a facially unconstitutional statute within the appropriate limitations period will insulate it forever. That is not now, and can never be, the law.

A. The Ninth Circuit's Opinion Conflicts With Relevant Decisions Of This Court

Over the last 50 years, some of the most important decisions of this Court have involved facial attacks, alleging invalidity because of unconstitutionality, on state constitutions or statutes which had been in existence for as long as 100 years, where only prospective relief was sought.[1] A few examples involving abortion, school segregation, voting and the loss of citizenship will suffice.

Abortion: This Court held in *Roe v. Wade*, 410 U.S. 113 (1973), that a Texas statute, first enacted in 1854, which made the procuring of an abortion a crime, was unconstitutional.

---

[1] There is no issue presented in the case at bar which in any way affects the applicable statute of limitations when retrospective relief—damages—is being sought.

Segregated schooling: This Court held in *Brown v. Board of Education*, 347 U.S. 483 (1954), that segregated schools were unconstitutional. *Brown* consolidated several different cases from several different states, including Virginia, Delaware, and South Carolina.

School segregation in Virginia had first been required by a law enacted during the 1869-1870 session of the Virginia legislature. *Davis v. County School Board*, 103 F.Supp. 337, 339 (E.D. Va. 1952).

The Delaware laws on school segregation went back at least as far as 1935 (347 U.S. at 486 n.1) and the South Carolina segregation laws went back at least as far as 1942. (*Id.*)

Voting: This Court held in *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), that poll taxes, first imposed by the Virginia Constitution of 1902, were unconstitutional.

This Court held in *Baker v. Carr*, 369 U.S. 186 (1962), that the plaintiffs' action for declaratory and injunctive relief, contending that the statute dealing with reapportionment of the state legislature in 1901, presented a justiciable question.

This Court held in *Reynolds v. Sims*, 377 U.S. 533 (1964), that the provisions of the Alabama Constitution of 1901, which set forth the manner in which the state legislature was to be reapportioned, was unconstitutional. This Court noted that the complaint had alleged that "the Alabama Legislature had established a pattern of prolonged inaction from 1911 to the present ..." (377 U.S. 540.)

This Court held in *Gray v. Sanders*, 372 U.S. 368 (1963), that a Georgia statute governing the manner in which primary elections were to be conducted was unconstitutional. The primary elections law had been enacted in 1917. *Sanders v. Gray*, 203 F.Supp. 158, 162-164 (N.D. Ga. 1962).

Loss of citizenship: This Court held in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), that the Nationality Act of 1940

and its counterpart, the Immigration and Nationality Act of 1952, which called for the automatic loss of citizenship for anyone who avoided military service by either leaving or remaining outside of the United States, were unconstitutional. The predecessor's statutes had first been adopted in 1865. (372 U.S. at 170.)

Each of these statutes held unconstitutional by this Court had been attacked on its face; no one contended that there were situations where the statutes could be applied in a constitutional manner. Each of the actions in which the statutes were held unconstitutional sought prospective relief.

It has long been this Court's policy to avoid constitutional questions if there is another ground for decision. See, *e.g., Clinton v. Jones*, ___ U.S. ___, 117 S.Ct. 1636, 1642 n.11 (1997). If the Ninth Circuit was right in the case at bar, then this Court disregarded its own policy by not applying the statute of limitations in *Roe v. Wade, Brown, Harper, Baker, Reynolds, Gray,* and *Sanders*. On the other hand, if the Ninth Circuit was wrong, as the NAHB and the BILD Foundation contend, then the way to correct its error is for this Court to issue its writ of certiorari and then reverse the Ninth Circuit's decision.

B. The Ninth Circuit's Opinion Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For This Court's Supervisory Power

This Court has often held that long standing statutes were unconstitutional on their face where the question of constitutionality arose in a specific context. The attacks claimed that the statutes involved were unconstitutional on their faces; the timing of the attack was dictated by the specific needs of the parties involved. To put it another way, the constitutionality was questioned in a case where an appropriate party had standing. This has been particularly true in the context of racial discrimination.

This Court held in *Loving v. Commonwealth of Virginia*, 388 U.S. 1 (1967), that Virginia's Racial Integrity Act of 1924, which prohibited interracial marriages, was unconstitutional. The Act's validity was questioned by a motion to vacate a previous criminal conviction. (388 U.S. at 3.)

This Court held in *Shelley v. Kramer*, 334 U.S. 1 (1948), that restrictive racial covenants recorded in 1911 and 1934 were unconstitutional. The invalidity of the covenants was raised as a defense to attempts by neighbors to obtain judicial enforcement of the covenants. (334 U.S. at 6-7.)

If the Ninth Circuit was right in the case at bar, then the petitioners in *Loving* and *Shelley* should not have been entitled to question the constitutionality of either Virginia's miscegenation laws or the restrictive racial covenants because the predicate actions had all been taken decades before the petitioners attacked their validity. This has never been the law.

This Court has held that

> "... an unconstitutional act is not a law, and can neither confer a right nor operate to supersede any existing valid law." *Chicago, I.&L.R.R. v. Hackett*, 228 U.S. 581, 566 (1913).

Unfortunately, this Court has never come right out and stated that no statute of limitations can ever bar an attack on a law which is claimed to be unconstitutional on its face where only prospective relief is sought.[2]

---

[2] This Court said something similar in *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968), where it stated that an invalid practice which had begun in 1912, and which had continued for over 40 years, was not immunized by the passage of time

> "We are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span. ... Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm on Hanover. Although Hanover could have sued in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955." 392 U.S. at 502 n.15.

It is time to do so now.

C. The Ninth Circuit's Opinion Conflicts With The Decision Of Another United States Court Of Appeals On The Same Important Matter

> "A law that works an ongoing violation of constitutional rights does not become immunized from legal challenge for all time merely because no one challenges it within two years of its enactment. '[T]he continued enforcement of an unconstitutional statute cannot be insulated by the statute of limitations.' *Virginia Hosp. Ass'n v. Baliles,* 868 F.2d 653, 653 (4th Cir. 1989), *aff'd in part on other grounds sub nom Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990); *accord National Adver. Co. v. City of Raleigh,* 947 F.2d 1158 (4th Cir. 1991)." *Kuhnle Brothers, Inc. v. County of Geauga,* 103 F.3d 516, 522 (6th Cir. 1997).

The Fourth and Sixth Circuits have it exactly right; the Ninth Circuit's position is simply wrong.

D. For Some Reason, The Ninth Circuit Does Not Want To Extend The Same Protection To Real Property That It Does To Other Constitutionally Protected Rights

The Ninth Circuit has, for whatever reason, set up a dichotomy between the protection of rights involving real property and other rights. It uses a number of mechanisms to keep cases involving real property out of the federal courts in the Ninth Circuit. For example, it is impossible to allege that governmental action regulating land use violates the promise of substantive due process guaranteed by the Fourteenth Amendment; instead, such an action must be brought as a takings case which must then be brought in state court. *Macri v. King County*, 110 F.3d 1496 (9th Cir. 1997); *Patel v. Penman*, 103 F.3d 868 (9th Cir. 1996); *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401 (9th Cir. 1986); and *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996). Even where a facial attack is brought contending that a taking has occurred and the federal courts have

jurisdiction, the Ninth Circuit demands that the district courts abstain. *Sinclair Oil Corp., supra.*

The Ninth Circuit has no problem in holding that the applicable statute of limitations does not bar an attack while a continuing wrong occurs in a non-takings context. See, *e.g., Gutowsky v. County of Placer*, 108 F.3d 256 (9th Cir. 1997), where it held that the statute of limitations on an action seeking damages for continuing discriminatory employment practices did not begin until the plaintiff had left her employment.[3]

All of this is directly contrary to the position taken by this Court as most particularly demonstrated by its decision in *Dolan*, which did two things.

First, *Dolan* reaffirmed the importance of the Fifth Amendment:

> "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights of the First Amendment of the Fourth Amendment, should be relegated to the status of a poor relation ...." *Dolan, supra*, 512 U.S. at 392.

This is, of course, in line with the Court's announcement in *United States v. James Daniel Good Real Property*, 510 U.S. 43, 61 (1993), that "Individual freedom finds tangible expression in property rights."

Second, and on a more practical basis, *Dolan* held that, before government can demand that a landowner turn over his or her land to the government, the government must make an individualized determination that a rough proportionality exists between the impacts of the new development and the amount

---

[3] The Ninth Circuit will go further in other contexts and find constitutionally protected rights where none exist. See, *e.g., Compassion in Dying v. State of Washington*, 49 F.3d 586 (9th Cir. 1995), *rev'd sub nom State of Washington v. Glucksberg*, ___ U.S. ___, 117 S.Ct. 2258 (1997)(constitutionally protected right to doctor assisted suicide).

of land being demanded from the landowner. *Dolan, supra*, 512 U.S. at 391-392.

The Ninth Circuit's error in the case at bar is striking. How can an action contending that a municipal ordinance is invalid on its face and which seeks only prospective, non-monetary relief be barred by a statute of limitations simply because it involves real property? How can the Ninth Circuit's holding in the case at bar possibly be reconciled with this Court's clear statements in *Dolan*? The answer is that it can't.

The Ninth Circuit's dismissive position on real property is going to continue unless, and until, this Court directs it to take a more balanced view.

CONCLUSION

The NAHB and the BILD Foundation contend that the Court of Appeals for the Ninth Circuit erred in its holding, that its holding is contrary to this Court's practice and procedure and the clear holdings of other federal Courts of Appeals, and that the importance of this matter requires that this Court issue its writ of certiorari to the Court of Appeals for the Ninth Circuit.

DATED: September 3, 1997

Respectfully submitted,

MARY V. DICRESCENZO
THE NATIONAL
ASSOCIATION OF HOME
BUILDERS OF THE
UNITED STATES

NICK CAMMAROTA
THE BUILDING
INDUSTRY LEGAL
DEFENSE FOUNDATION

KENNETH B. BLEY
COX, CASTLE &
NICHOLSON LLP
Attorneys for Petitioners
THE NATIONAL
ASSOCIATION OF HOME
BUILDERS OF THE
UNITED STATES AND
THE BUILDING
INDUSTRY LEGAL
DEFENSE FOUNDATION

APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JUN 09 1997
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES; BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION,	
Plaintiffs-Appellants,	No. 96-55274
v.	D.C. No. CV-95-06369-R
CITY OF LOS ANGELES,	
	MEMORANDUM*
Defendant-Appellee.	

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted May 8, 1997
Pasadena, California

Before: PAMELA ANN RYMER and SIDNEY R. THOMAS, Circuit Judges, and Owen M. Panner**, Senior District Judge.

The parties are familiar with the factual and procedural history of the case, so we will not set it forth in detail here.

I

We review dismissal of a complaint for failure to state a claim de novo. *Oscar v. University Students Coop. Ass'n*, 965 F.2d 783, 785 (9th Cir. 1992) (en banc). All allegations of material fact in the complaint are taken as true and are construed in the light most favorable to the nonmoving party. *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996).

The proposed first amended complaint explicitly alleges that the associations' members have been required to make dedications and improvements under the Los Angeles Municipal Code ("Code"), continue to be required to make dedications and improvements under the Code, and will in the future be required to make dedications and improvements under the Code.

An association has standing to bring suit on behalf of its members if: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the

** Honorable Owen M. Panner, Senior United States District Judge for the District of Oregon, sitting by designation.

claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

The plaintiffs' allegations concerning standing are sufficient to overcome a Rule 12(b)(6) motion. The associations' members would have standing to sue in their own right because the alleged harm has directly affected them in the past and will continue to directly affect them in the future. The interests the associations seek to protect are relevant to their purposes as home builder and developer organizations. The associations assert a facial challenge to the ordinance and request declaratory and injunctive relief, and thus neither the claim nor the relief requires the individual participation of the associations' members.

Therefore, as the City concedes, the district court erred in granting the motion to dismiss based on lack of standing. We note that *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468 (9th Cir. 1994), holds that a property owner did not have standing to make a facial challenge to a statute unless "he was a property owner subject to the statute at the time of its enactment." *Id.* at 476. At this stage of the proceedings, the record is silent as to whether any of the associations' members satisfy this requirement. Thus, defendants would not be precluded from raising the standing issue by summary judgment motion or through a preliminary hearing. *Barrett Computer Servs., Inc. v. PDA, Inc.*, 884 F.2d 214, 219-20 (5th Cir. 1989).

II

Having determined that the associations have standing, at least at this stage of the litigation, we examine whether the plaintiffs' complaint is barred by the statute of limitations. We conclude that it is.

In attacking a regulation as an unconstitutional taking, a plaintiff can bring either an as-applied challenge or a facial challenge. *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 686

(9th Cir. 1993). The associations have brought a facial challenge.

A plaintiff faces "an uphill battle in making a facial attack on the zoning restriction as a taking." *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 406 (9th Cir. 1996) (quotations omitted). To prevail on a facial challenge, a plaintiff must demonstrate that the "mere adoption of the ordinance [] constitutes an uncompensated taking." *Southern Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 505 (9th Cir. 1990). That is, a plaintiff must demonstrate that the mere adoption of the ordinance either denies the plaintiff economically viable use of her or his property or does not substantially advance legitimate state interests.

In their complaint, the associations argue that the ordinance does not meet the standards articulated in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and thus does not substantially advance legitimate state interests. Specifically, the associations allege that the ordinance violates *Dolan* because the ordinance lacks "rough proportionality" to the use of the property sought and because it is applied without individual determination. The associations allege that the "mere enactment" of this allegedly unconstitutional ordinance is a taking because it affects property values and discourages development. *See Levald*, 998 F.2d at 688 ("In the takings context, the basis of a facial challenge is that the very enactment of the statute has reduced the value of the property or has effected a transfer of a property interest.").

Facial challenges to statutes are subject to the statute of limitations. *Id.* at 687. "In a facial taking, the harm is singular and discrete, occurring *only* at the time the statute is enacted." *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 476 (9th Cir. 1994). " 'In the takings context, the basis of a facial challenge is that the very enactment of the statute has reduced the value of the property or has effected a transfer of a property interest. This is a *single harm*, measurable and compensable *when the statute is passed.*' " *Id.* (quoting *Levald*, 998 F.2d at 688).

Certainly, a landowner may suffer injury at the time the ordinance is enacted against her or him. "However, this injury is relevant only in the context of an *as-applied* takings claim," *id.* at 477 n.8, which has not been raised in this suit.

We have treated regulatory takings claims as subject to section 1983 analysis for statute of limitations period purposes. *See Levald*, 998 F.2d at 684, 687-88. For California actions accruing prior to 1985, the statute of limitations is three years. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). For actions accruing after 1985, the statute of limitation is one year. *Levald*, 998 F.2d at 688. The challenged ordinance was passed in 1962. This suit was filed on September 22, 1995, long after the statute of limitations had run. Even if we accepted the argument that *Dolan* revived the statute of limitations, this action would be time-barred. *Dolan* was decided June 24, 1994; this action was filed more than a year later. Therefore, the associations' suit is barred by the statute of limitations.

The associations argue that the statute of limitations does not bar their suit because they seek equitable and declaratory relief. We previously expressly rejected this argument. *Levald*, 998 F.2d at 688.

In post-briefing submissions and in oral argument, the associations also argue that the Supreme Court has considered the constitutionality of statute scores of years after enactment, citing *Loving v. Commonwealth of Virginia*, 388 U.S. 1 (1967) and *Brown v. Board of Educ.*, 347 U.S. 483 (1954). We have twice previously rejected this contention. "In non-taking contexts, the harm is continuing or does not occur until the statute 'is enforced,' and consequently the Supreme Court has allowed non-taking challenges to statutes 'long after they were enacted." *Carson*, 37 F.3d at 476 n.7 (quoting *Levald*, 998 F.2d at 688). We also note that *Loving* and *Brown* involved as-applied, not facial constitutional challenges. Neither case involved takings claims.

Because the statute of limitations bars relief, we affirm the judgment of the district court.

AFFIRMED.

NAHB v. City of Los Angeles, No. 96-55274

RYMER, Circuit Judge, concurring:

I concur in the judgment because I do not believe that a facial challenge to this ordinance on a theory that it conflicts with *Dolan* is possible to evaluate absent a factual record showing how the ordinance is applied in light of *Dolan*. *See Southern Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 506 n.9 (9th Cir. 1990). As we can't say in the abstract whether the required dedication of property is unrelated in nature, or disproportionate in extent, to the problem that the City seeks to mitigate or control, the action is not ripe and was properly dismissed as non-justiciable.

APPENDIX B

SEC. 12.37. HIGHWAY AND COLLECTOR STREET DEDICATION AND IMPROVEMENT.

(Title amended by Ord. No. 150,799, Eff. 6/5/78.)

A. Requirement. (Amended by Ord. No. 150,799, Eff. 6/5/78.) No building or structure shall be erected or enlarged, and no building permit shall be issued therefor, on any lot in any R3 or less restrictive zone (as such order of restrictiveness is set forth in Subsection B of Section 12.23); or on any lot in the RD1.5, RD2 or RD3 Zones; if such lot abuts a major or secondary highway or collector street unless the one-half of the highway or collector street which is located on the same side of the center of the highway or collector street as such lot has been dedicated and improved for the full width of the lot so as to meet the standards for such highway or collector street provided in Subsection H of this section; and further provided that in the case of either a corner lot or an L-shaped interior lot abutting a major or secondary highway and a local street which intersect, that one-half of the local street, on the same side of the center of said local street as such lot, has been dedicated and improved for that portion of said lot or lots within 300 feet of the ultimate property line of said highway so as to meet the standards for local streets provided in Subsection H of this section and provide adequate right-turn ingress to and egress from the highway; or such dedication and improvement has been assured to the satisfaction of the City Engineer respectively. As used in this section, the center of the highway or collector street shall mean the centers of those highways or collector streets as such are shown on the Highways and Freeways Element or, with respect to collector streets, on the adopted Community Plan Elements of the General Plan on file in the office of the Department of City Planning. Centers of streets other than those designated as highways or collector streets shall be determined by the City Engineer. **(Amended by Ord. No. 152,425, Eff. 6/29/79, Oper. 7/1/79.)**

1. The maximum area of land required to be so dedicated shall not exceed 25% of the area of any such lot which was of record on March 1, 1962 in the Los Angeles County Recorder's Office. In no event shall such dedication reduce the lot below a width of 50 feet or an area of 5,000 square feet.

2. No such dedication for any highway, collector street or any other street shall be required with respect to those portions of such a lot occupied by a legally existing main building which is to remain.

3. No additional improvement shall be required on such a lot where complete roadway, curb, gutter and sidewalk improvements exist within the present dedication contiguous thereto.

4. No building or structure shall be erected on any such lot after March 1, 1962 within the dedication required by Subsection H of this section.

B. Exceptions. The provisions of Subsection A of this section shall not apply to the following construction:

1. One single-family dwelling with customary accessory buildings when erected on a vacant lot.

2. Additions and accessory buildings incidental to a residential building legally existing on the lot, provided no additional dwelling units or guest rooms are created.

3. Additions and accessory buildings incidental to other than a residential building existing on the lot on March 1, 1962, provided that the total cumulative floor area of all such additions and accessary buildings shall not exceed 200 square feet.

C. Dedication Procedure.

1. Any person required to dedicate land by the provisions of this section shall make an offer to dedicate, properly

executed by all parties of interest including beneficiaries in deeds of trust as shown by a current preliminary title report prepared by a Title Company approved by the City Engineer for that purpose. The trustee under a deed of trust shall not be required to execute the dedicatory instrument, unless, in the view of the City Engineer, such execution is necessary to satisfactorily dedicate the land. Such report shall be furnished by the applicant. Such offer shall be on a form approved by the City Attorney and the City Engineer; be in such terms as to be binding on the owner, his heirs, assigns or successors in interest and shall continue until the City Council accepts or rejects such offer or until one year from the date such offer is filed with the City Engineer for processing, whichever occurs first. The offer shall provide that the dedication will be complete upon acceptance by the City Council. The offer shall be recorded by the City Engineer in the Office of the County Recorder of Los Angeles County upon its acceptance by the City Engineer. The City Engineer shall accept or reject the offer for recordation within 10 days after it is filed with the City Engineer. The offer shall thereafter be promptly processed by the City Departments concerned and submitted to the City Council, in order to complete the dedication within one year. If the offer is rejected by the City Council or not processed within one year, the City Engineer shall issue a release from such offer which shall be recorded in the Office of the County Recorder unless the parties making the offer wish to have the time extended. **(Amended by Ord. No. 152,425, Eff. 6/29/79, Oper. 7/1/79.)**

D. Improvement Procedure.

1. Any person required to make improvements by the provisions of this section shall either make and complete the same to the satisfaction of the City Engineer or shall file with the City Engineer a bond in such an amount as the City Engineer shall estimate and determine to be necessary to complete all of the improvements required.

2. Such bond may be either a cash bond or a bond executed by a company authorized to act as a surety in this State. The bond shall be payable to the City and be conditioned upon the faithful performance of any and all work required to be done, and that should such work not be done or completed within the time specified, the City may at its option, cause the same to be done or completed, and the parties executing the bond shall be firmly bound under a continuing obligation for the payment of all necessary costs and expenses incurred in the construction thereof. The bond shall be executed by the owner of the lot as principal, and if a surety bond, shall also be executed by a corporation authorized to act as a surety under the laws of the State of California.

3. Whenever the owner elects to deposit a cash bond, the City is authorized, in the event of any default on his part, to use any or all of the deposit money to cause all of the required work to be done or completed, and for payment of all costs and expenses therefor. Any money remaining shall be refunded to the owner.

4. When a substantial portion of the required improvement has been completed to the satisfaction of the City Engineer and the completion of the remaining improvements is delayed due to conditions beyond the owner's control, the City Engineer may accept the completed portion and consent to a proportionate reduction of the surety bond in an amount estimated and determined by the City Engineer to be adequate to assure the completion of the required improvements remaining to be made.

5. Whenever a surety bond has been filed in compliance with this section, the City is authorized, in the event of any default on the part of the principal, to enforce collection, under such bond, for any and all damages sustained by the City by reason of any failure on the part of the principal faithfully and properly to do or complete the required

improvements, and in addition may cause all of the required work to be done or completed, and the surety upon the bond shall be firmly bound for the payment of all necessary costs thereof.

6. The term of the bond shall begin on the date of the deposit of cash or the filing of the surety bond, and shall end upon the date of the completion to the satisfaction of the City Engineer of all improvements required to be made. The fact of such completion shall be endorsed by a statement thereof signed by the City Engineer, and the deposit shall be returned to the owner, or the surety bond may be exonerated at any time thereafter.

7. For purposes of this section, improvement shall be considered as satisfactorily assured when the City Engineer accepts the cash or surety bond provided for herein or the improvements required to be made have been completed to his satisfaction. When the City Engineer accepts the bond or the work has been completed to his satisfaction he shall notify the Department of Building and Safety thereof.

E. Issuance of Building Permits After Certification Of Dedication And Improvement. When all dedication and improvements required by this section have been completed or satisfactorily assured a building permit may be issued.

F. Fees. (Amended by Ord. No. 168,332, Eff. 12/17/92)

1. A fee shall be charged to provide for the City's cost of investigating and processing this service, said fee to be as follows:

(a) To all property subject to this section, whether or not any dedication or improvements are actually required, so as to provide for the cost of investigation, the fee shall be $276.

(b) If improvements or repairs are required, an additional fee so as to provide for the cost of bonding the

improvements shall be $270. In addition, the standard permit fees for constructing the improvements or repairs shall apply.

(c) If dedication is required, an additional fee to provide for the cost of processing the real estate transfer documents shall be $1,689.

2. The Board of Public Works shall have the authority to annually review the cost of providing this service and adjust the fees accordingly, subject to the disapproval of the Mayor or the City Council within 30 days after receipt.

G. Lots Affected By Street Widening. (Amended by Ord. No. 125,340, Eff. 9/23/63.) On a lot which is affected by street widening required by the provisions of this section all required yards, setbacks, parking area, loading space and building locations for new buildings or structures or additions to buildings or structures shall be measured and calculated from the new lot lines being created by said widening; provided, however, that for the purpose of establishing the required front yard depth on a frontage where the ultimate street line has been determined under the provisions of this section, the depths of all existing front yards may be measured from such ultimate street line instead of the front lot line.

In applying all other provisions of this Article, the area of such lot shall be considered as that which existed immediately prior to such required street widening.

H. Improvement Standards. (Amended by Ord. No. 150,799, Eff. 6/5/78.)

1. All major and secondary highways and collector streets shall be constructed and improved in accordance with the following standards insofar as such is practical and will not create an undue hardship:

(a) Major highways shall be dedicated to a width of 100 feet, with 80 feet of roadway and 20 feet of sidewalk. Each

one-half of said highway shall consist of 40 feet of paved roadway, curb and gutters and 10 feet of sidewalk.

Where major highways are divided by a dividing strip, the width of the dividing strip shall not be considered a part of the highway for the purpose of calculating either the width of the dedication or the width of improvement required by this section.

(b) Secondary highways shall be dedicated to a width of 86 feet with 66 feet of roadway and 20 feet of sidewalk. Each one-half of said highway shall consist of 33 feet of paved roadway, curb and gutters, and 10 feet of sidewalks. In addition to the dedication required in paragraph (b) above, flare sections will be required on each side of a secondary highway which intersects with a major or secondary highway. Each flare section shall be 370 feet in length and shall be two feet in width for the first 220 feet measured from the intersection and then shall taper in the next 150 feet from two feet in width to zero feet in width at the end of the section.

(c) Collector streets shall be dedicated to a width of 64 feet, with 44 feet of roadway and two 10-foot parkways. Each one-half of said collector street shall consist of 22 feet of roadway, curbs and gutters and 10 feet of sidewalk and parkway, with at least five feet thereof paved.

(d) In addition, each intersection of either a major or secondary highway with any other street shall be dedicated so as to provide a 20 foot curved corner radius or an equivalent 15-foot x 15-foot cut corner and each intersection of a collector street with a street other than a highway, shall be dedicated to provide a 15-foot curved corner radius of an equivalent of 10-foot x 10-foot cut corner and shall be improved in accordance with the standards for such highway or street set forth in this section.

2. All streets not designated major or secondary highways or collector streets, but that intersect said highways, shall be dedicated to a maximum width of 60 feet with a 40-foot roadway and two 10-foot parkways. Each one-half of said street shall consist of a maximum of 20 feet of roadway, curbs and gutters, and a maximum 10 feet of sidewalk and parkway, with at least five feet thereof paved. Whenever uncertainty exists as to the application of the provisions of this section, or in instances of streets so classified as requiring less than 60 feet of dedication in order to conform to the minimum width standards as adopted in accordance with Section 17.05-B of this Code, the City Engineer shall make any necessary determinations.

3. All improvements required to be made by the provisions of this subsection shall be done in accordance with the current applicable provisions of the Standard specifications for Public Works Construction adopted by the City Council.

4. The City Engineer may approve and allow such variations from the aforesaid requirements as he determines are made necessary by the conditions of the terrain and the existing improvements contiguous to the property involved.

I. Appeal. (Amended by Ord. No. 153,949, Eff. 7/19/80.)

1. Any person required to make improvements under the provisions of this section may appeal any determination made by the City Engineer in the enforcement or administration of the provisions of this section to the City Council. Such appeal shall be made in writing unless waived by the applicant, shall state in clear and concise language the grounds therefor, and shall be accompanied by a filing fee as hereinafter determined and established. The Board of Public works, with the concurrence of the City Administrative Officer, shall determine on a regular basis the costs to the City for processing such an appeal. These costs shall be the total verifiable costs incurred including inspection costs, retirement costs on direct labor, departmental and general City overhead and all other

applicable indirect costs, as determined by the Board of Public Works. The Board of Public Works shall use these costs to establish a fee sufficient to recover City costs of processing such appeal. The Board of Public Works, after notice and hearing as provided by law, shall adopt such fee at any time during each fiscal year, but not later than April 1. Upon adoption by the Board of Public Works as provided herein, the Board shall transmit copies of the Board Order to the Mayor and to the City Council. At any time within 30 days after the receipt of the Board Order, the Mayor, by writing, or the Council, by majority vote, may disapprove the Board Order. If neither the Mayor nor the City Council has disapproved the Board Order within said period, the fee shall become effective 30 days from receipt of the Board Order but may be made operative at such later date as is established by the Board. Provided, however, that if the Board Order is received by the Mayor and Council on different dates, the later date received shall be used to determine the effective date of the Board Order. In the event the Board fails to adopt a Board Order setting forth a new fee for recovery of costs before April 1, or in the event that within 30 days after delivery of such Board Order to the Mayor and to the City Council by the Board, either the Mayor or the Council disapproves the Board Order, the Board Order shall have no force or effect on any fee heretofore established, either by action of the Board or by ordinance, and such heretofore established fee shall be the applicable fee to be charged. In the event the City Council, in disapproving said fee, recommends to the Board that the subject fee be either increased or decreased in a specified amount, the Board may, upon receipt of such recommendation, adopt the fee as recommended by the City Council, provided the Board acts within 30 days of receipt of such recommendation by the Council. Such fee shall become effective upon adoption by the Board of the fee recommended by the Council, irrespective of whether such action is taken by the Board after April 1. **(Amended by Ord. No. 163,803, Eff. 8/15/88.)**

2. The City Council may make such modifications in the improvement requirements of this section or may grant such waivers or modifications of the determinations which are appealed to it as it shall determine are required to prevent any unreasonable hardship under the facts of each case so long as each such modification or waiver is in conformity with the general spirit and intent of the requirements of this section.

J. City May Share The Cost of Making Unusual Improvements. Upon proper application to the City Council and upon recommendation of the City Engineer, the City may accept and provide for contribution toward the cost of making any improvement required by the provisions of this section which the City Engineer determines will cost an amount greatly in excess of the cost to other property owners who are required to make improvements under the provisions of this section in the immediate vicinity of the said improvement.

K. City Engineer To Determine Street Alignment. Whenever uncertainty exists as to the proper application of the provisions of this section in the matter of street alignment, the City Engineer shall determine their application in conformity with the spirit and intent of this section. **(Added by Ord. No. 125,340, Eff. 9/23/63.)**

L. Written Notification To Permit Applicants Required. When the City Engineer determines that the provisions of this section are applicable to any building permit application, he shall inform the permit applicant of his determination, of the specified requirements of this Section which he determines to be applicable thereto and of the availability and procedure for appeal of his determination to the City Council. **(Amended by Ord. No. 153,949, Eff. 7/19/80.)**

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
(Western Division)

NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES,

and

BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION

Plaintiffs,

v.

CITY OF LOS ANGELES, CALIFORNIA

Defendant.

Civil Action No. 95- 6369 R

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. Nature of Action

1. This Complaint seeks declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202, Federal Rules of Civil Procedure 57 and 65, and the United States Constitution, Amendments Five and Fourteen.

2. This action challenges the constitutional validity of Los Angeles Municipal Code § 12.37 (Highway and Collector Street Dedication and Improvement) ("§ 12.37"). Plaintiffs state that § 12.37 violates the rights of Plaintiffs' members as provided by the United States Constitution, Amendments Five and Fourteen.

3. This action facially challenges the constitutional validity of § 12.37. By its terms, there are no circumstances under which the City of Los Angeles ("City") could apply § 12.37 in a constitutional manner.

II. Jurisdiction and Venue

4. This Court maintains subject matter jurisdiction over this action pursuant to the provisions of 28 U.S.C. §§ 1331, 2201 and 2202.

5. This Court maintains personal jurisdiction over defendant City since all of the actions complained of herein occurred in the State of California. Furthermore, this defendant is a political subdivision of the State of California.

6. Venue is appropriate in this Court pursuant to the provisions of 28 U.S.C. § 1391 (b) and General Order 349 of this Court.

III. Parties

A. Plaintiffs

7. Plaintiff National Association of Home Builders ("NAHB") is a not-for-profit corporation organized under the laws of the State of Illinois. NAHB's corporate headquarters are located at 1201 Fifteenth Street, N.W., Washington, D.C. 20005. NAHB functions as a trade association, representing over 180,000 members organized in approximately 850 affiliated state and local associations located in all fifty states, the District

of Columbia, and Puerto Rico. NAHB's members are involved in all aspects of the building and construction industry.

8. Plaintiff Building Industry Legal Defense Foundation ("BILD") is a not-for-profit corporation organized under the laws of the State of California. BILD's corporate headquarters are located at 1330 Valley Vista Drive, Diamond Bar, California 91765. BILD is a wholly owned subsidiary of the Building Industry Association of Southern California ("BIA-Southern California").

9. BIA-Southern California is an affiliate of NAHB with over 1400 members involved in all aspects of the building and construction industry. BIA-Southern California members are involved in the construction of 70% of all new homes annually in the Southern California region.

10. Each BIA-Southern California member is also a member of NAHB.

11. BILD's mission is to "[d]efend the legal rights of home and property owners." BILD promotes and supports legal cases to secure a body of favorable court decisions for its members specifically, and property owners and developers generally. BILD's efforts are coordinated with the California Building Industry Association and NAHB so as to allow the housing industry to speak with one voice.

12. Plaintiffs represent their members' interests, many of whom regularly conduct business directly related to the housing and construction industry in Los Angeles. These members' interests are directly impacted by § 12.37. Section 12.37 directly imposes costs upon Plaintiffs' members, and unfairly and illegally singles Plaintiffs' members out to contribute a disproportionate share of private resources for the general public benefit.

13. The mere existence of § 12.37 has injured all of Plaintiffs' members. Section 12.37 not only directly imposes costs upon Plaintiffs' members, but also interferes with the

value of real property generally, increasing prices and discouraging needed development and progress.

B. Defendant

14. The City is a political subdivision of the State of California.

IV. Facts

15. Section 12.37 is a statutory provision of the Los Angeles Municipal Code which has the full effect and applicability of law within the boundaries of the City.

16. Section 12.37 applies to those persons who wish to erect or enlarge buildings or structures, or to obtain permits for such purposes on any lot within the City, zoned as provided by § 12.37, which "abuts a major or secondary highway or collector street...."

17. Section 12.37 requires that one-half (½) of the highway or collector street adjacent to the lot upon which a person wishes to erect or enlarge a building or to obtain a building permit, be dedicated to the city and improved to meet certain standards for the width of the lot as a condition of the issuance of the required building permit.

18. Section 12.37 further provides for the dedication and improvement of one-half (½) of side streets intersecting major or secondary highways for that portion of lots within 300 feet of the highway property lines so as to meet certain standards.

19. Section 12.37 does not provide for the payment of compensation to those persons required to make these dedications and improvement.

20. Plaintiffs' members, as property owners and as contractors, are persons required to make dedications and improvements under § 12.37 in order to obtain necessary building permits.

V. Cause of Action

(Violation of the Fifth and Fourteenth Amendments – "Rough Proportionality")

21. Plaintiffs repeat and incorporate herein the allegations contained in paragraphs 1-20.

22. The United States Constitution, Amendment Five, prohibits the taking of private property without just compensation. Amendment Five's "takings" clause is applicable to the states and their political subdivisions by operation of the United States Constitution, Amendment 14.

23. Amendment Five requires that there must be a "rough proportionality" between an exaction or dedication imposed by the government and the projected impact of a proposed real estate development or other lawful use of real property upon existing infrastructure and services.

24. Amendment Five requires that government must make an "individual determination" that required exactions are related both in nature and extent to the proposed real estate development's impact on existing infrastructure and services. Such an "individual[ized] determination" must be based upon objective and quantifiable facts, and not mere conclusory projections.

25. The required street dedications and improvements are exactions and dedications within the context of Amendment Five.

26. In light of the United States Supreme Court's decision in *Dolan v. City of Tigard*, as a condition precedent to requiring street improvements by a building permit applicant, the City has a non-discretionary duty to conduct a quantifiable and individualized determination as to the impact of any proposed development upon existing services and infrastructure.

The purpose of this determination is to ensure that any dedications or exactions are "roughly proportional" to the proposed development's impact, if any, upon existing municipal services and infrastructure.

27. The dedications and improvements required by § 12.37 are not based upon any "individual[ized] determination", but rather are based upon citywide infrastructure needs. Therefore, there is no "rough proportionality" between the required dedications and improvements and any specific proposed development's impact.

28. Section 12.37's required dedications and improvements constitute uncompensated takings in violation of the United States Constitution, Amendment Five.

29. The "mere existence" of § 12.37 has injured Plaintiffs' members. Section 12.37 not only directly imposes costs upon builders and property owners, but also interferes with the value of the real property, raising prices and discouraging needed development and progress.

30. Section 12.37 is facially unconstitutional, and thus illegal, invalid, and unenforceable.

31. There is no manner or circumstance in which § 12.37 can be applied in a constitutional fashion.

32. As a result of the "mere existence" of § 12.37, Plaintiffs' members have been irreparably damaged. Absent court intervention, Plaintiffs' members will continue to be irreparably damaged.

VI. Prayer For Relief

Plaintiffs NAHB and BILD pray for relief against defendant City as follows:

1) That this Court issue an order declaring § 12.37 to be in violation of the United States Constitution, Amendments Five and Fourteen, and, as such, null and void;

2) That the City, its officials, employees, agencies, divisions, agents and/or any other persons acting on its behalf be enjoined from enforcing § 12.37, or taking any actions pursuant to § 12.37; and,

3) For such other and further relief as may be required in order to satisfy the ends of justice.

Respectfully submitted,

/s/ KENNETH B. BLEY

Kenneth B. Bley
COX, CASTLE & NICHOLSON
2049 Century Park East
Twenty-Eight Floor
Los Angeles, California 90067
(310) 277-4222

Attorney for the National Association of Home Builders of the United States and the Building Industry Legal Defense Foundation

/s/ GLEN FRANKLIN KOONTZ

Glen Franklin Koontz
1201 Fifteenth St. N.W.
Washington, D.C. 20005
(202) 822-0359

Attorney for the National Association of Home Builders of the United States

---

September 22, 1995.

Supreme Court, U.S.
FILED
OCT 6 1997
CLERK

(2)

No. 97-427

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

THE NATIONAL ASSOCIATION OF
HOME BUILDERS OF THE UNITED STATES AND THE
BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION,
Petitioners,

vs.

CITY OF LOS ANGELES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES K. HAHN
City Attorney
CLAUDIA MCGEE HENRY
Senior Assistant City Attorney
ANTHONY SAUL ALPERIN
Assistant City Attorney
Counsel of Record
SHARON SEIDORF CARDENAS
Assistant City Attorney

LOS ANGELES CITY ATTORNEY'S OFFICE

200 North Main Street
Room 1700, City Hall East
Los Angeles, California 90012-4130
(213) 485-4510

Attorneys for Respondent

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (714) 720-1510

17 pp

QUESTION PRESENTED

Does a statute of limitations bar a facial challenge to an ordinance on the basis that the adoption of the ordinance results in a taking of property without compensation when the relief sought is declaratory and injunctive?

PARTIES TO THE PROCEEDINGS

The identities of the petitioners in this Court are set forth in the Petition for a Writ of Certiorari. The respondent is the City of Los Angeles, a municipal corporation in the State of California.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1

STATEMENT OF THE CASE 1

REASONS WHY THE WRIT SHOULD BE DENIED 3

A. The Opinion Of The Court Of Appeals Does Not Conflict With Relevant Decisions Of This Court 4

B. There Is No Conflict Among The Circuit Courts of Appeals Concerning The Application Of The Statute Of Limitations To Facial Challenges Asserting A Taking Of Property Without Compensation 6

TABLE OF CONTENTS (Cont'd)

Page

C. The Statute Of Limitations Bars Relief Even Though Petitioners Seek Declaratory And Injunctive Relief Rather Than Damages 9

CONCLUSION 10

TABLE OF AUTHORITIES

Cases **Page**

Azul Pacifico v. City of Los Angeles,
973 F.2d 704 (9th Cir. 1992) 6

Baker v. Carr,
369 U.S. 186 (1962) 5

Brown v. Board of Education,
347 U.S. 483 (1954) 5

Cope v. Anderson,
331 U.S. 461 (1947) 9

De Anza Properties X, Ltd. v. County of Santa Cruz,
936 F.2d 1084 (9th Cir. 1991) 6

Dolan v. City of Tigard,
512 U.S. 374 (1994) 2, 3, 4

Gray v. Sanders,
372 U.S. 368 (1963) 6

Harper v. Virginia State Board of Elections,
383 U.S. 663 (1966) 5

Kennedy v. Mendoza-Martinez,
372 U.S. 144 (1963) 6

Kuhnle Brothers, Inc. v. County of Geauga,
103 F.3d 516 (6th Cir. 1997) 7, 8

TABLE OF AUTHORITIES (Cont'd)

Cases **Page**

Levald, Inc. v. City of Palm Desert,
998 F.2d 680 (9th Cir. 1993), ... 6, 8, 9

National Advertising Company v. City of Raleigh,
947 F.2d 1158 (4th Cir. 1991) 7

Reynolds v. Sims,
377 U.S. 533 (1964) 6

Russell v. Todd,
309 U.S. 280 (1940) 9

Roe v. Wade,
410 U.S. 113 (1973) 5

Municipal Statute

Los Angeles Municipal Code
§ 12.37 ..... 1, 2

Rules Of Court

Supreme Court Rule 10 3

OPINION BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is unreported. The memorandum opinion of that court is set forth as Appendix A to the Petition for Writ of Certiorari (Petition).

JURISDICTION

Respondent does not disagree with the statement of jurisdiction set forth in the Petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondent does not disagree with the statement of constitutional and statutory provisions at issue as set forth in the Petition.

STATEMENT OF THE CASE

In 1962, the City of Los Angeles enacted Los Angeles Municipal Code (LAMC) § 12.37. That ordinance provides that, with certain exceptions, buildings may not be constructed or enlarged on a lot in commercial, industrial and most multi-family residential zones if the lot abuts a major or secondary highway or collector street, unless the half of the highway or street adjacent to the lot is dedicated and improved to meet certain uniform standards. In lieu of making a dedication and constructing the street improvements prior to obtaining a building permit, a property owner is allowed to provide assurances to the City Engineer that the dedication and/or improvements will be

made in the future. These requirements do not apply to buildings in any single family zone, in some multi-family zones or along "local" streets. The ordinance allows for exemptions from the requirements in order to prevent unnecessary hardships.

In September 1995, the petitioners filed a complaint in the District Court for the Central District of California, contending that LAMC § 12.37 results in a taking of their members' property without compensation because the dedication and improvement standards of the ordinance do not meet the requirements of *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The complaint attempts to state a facial, not an as-applied, challenge to the ordinance. The District Court granted the respondent's motion to dismiss without prejudice. Upon petitioners' filing an amended complaint, the respondent sought a dismissal of that pleading for failure to state a claim on which relief could be granted, and the District Court granted that motion with prejudice. The basis for that court's rulings was that the petitioners did not have standing to bring the action.

A majority of the Court of Appeals affirmed but on a different ground than that stated by the District Court, namely that the applicable statute of limitations bars petitioners' facial challenge.[1] One member of the panel

---

[1] The Court of Appeals did not "quickly [find] that the NAHB and the BILD Foundation had standing," as asserted by the petitioners. See Petition at 3-4. Rather, the court held that "plaintiffs' allegations concerning standing are sufficient to overcome a Rule 12(b)(6) motion," stating further that ". . . defendants would not be precluded from raising the standing issue by summary judgment motion or through a preliminary hearing." Petition at A-3. Thus, the

concurred in the judgment, stating that she did so "because I do not believe that a facial challenge to this ordinance on a theory that it conflicts with *Dolan* is possible to evaluate absent a factual record showing how the ordinance is applied in light of *Dolan*." Petition at A-6.

REASONS WHY THE WRIT SHOULD BE DENIED

This case does not meet the criteria for the issuance of a writ of certiorari as set forth in Rule 10 of the Rules of this Court, and the Petition should be denied. The decision of the Ninth Circuit Court of Appeals does not conflict either with the decisions of this Court or of other circuits of the Courts of Appeals.

Consistent with the purposes and effect of any statute of limitations, the Ninth Circuit decision below shields the City's ordinance from facial challenges. It does not, however, shield the City's ordinance from as-applied challenges, and a property owner who believes that the dedication and/or improvement requirements imposed as conditions of a discretionary permit do not meet the criteria of *Dolan*, *supra*, can file such a challenge at the time the exaction is imposed. Petitioners' challenge, however, was solely a facial attack on the ordinance and thus properly subject to the bar of the statute of limitations.

Court of Appeals made a determination concerning Petitioners' standing only with respect to the sufficiency of their pleading. ("Having determined that the associations have standing, at least at this stage of the litigation, we examine whether the plaintiffs' complaint is barred by the statute of limitations." *Id.*)

A. The Opinion Of The Court Of Appeals Does Not Conflict With Relevant Decisions Of This Court.

Petitioners cite a series of decisions of this Court striking down a variety of statutes on the ground that the statute involved in each case violated constitutional rights of the parties bringing the actions, even though the challenges were filed many years after the enactment of the statutes involved. Petitioners assert that these decisions support their contention that a facial constitutional challenge to a statute or ordinance, seeking only declaratory and/or injunctive relief, is never barred by a statute of limitations. These decisions do not support that assertion.

A taking of property can occur only upon the enactment of a statute or ordinance or at the time the statute or ordinance is actually applied to a particular parcel of real property.[2] As the Ninth Circuit opinion points out, the petitioners here "allege that the 'mere enactment' of this allegedly unconstitutional ordinance is a taking because it affects property values and discourages development." Petition at A-4. Significantly, the petitioners do not allege any particular instance in which any of their members were

---

[2] A challenge based on *Dolan* can be brought only at the time the government actually imposes an exaction as a condition of a discretionary permit. This is so because the standard for reviewing the governmental decision required by *Dolan* involves consideration of the relationship ("rough proportionality") between a particular permit condition and the impacts of the development project which justify the exaction: "[T]he city must make some sort of *individualized* determination that the required dedication is related both in nature and extent to the impact of the proposed development." 512 U.S. at 391 (emphasis added).

denied a permit or were required to dedicate property or make street improvements as a result of the ordinance. Their attack on the ordinance is therefore purely facial and hypothetical.

The cases cited by the petitioners all arose in a decidedly different context. Each involves either a continuing violation or an as-applied challenge to the statute involved. *Brown v. Board of Education*, 347 U.S. 483 (1954) did not arise in a hypothetical context. Rather, African-American school children, who were not allowed to attend integrated schools, sought to "enjoin enforcement" of the Kansas statute permitting segregated schools. *Id.* at 486-488 & n.1. The wrong they sought to correct was not the enactment of the statute but its enforcement.

Each of the other cases on which petitioners rely involved either the actual application of the challenged statute to the plaintiffs or a situation where the existence of the statute constituted a continuing constitutional violation. *Roe v. Wade*, 410 U.S. 113 (1973) (continuing threat of prosecution inhibits persons from seeking or obtaining abortions); *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966) (citizens who could not afford to pay a poll tax were not allowed to vote);[3] *Baker v. Carr*, 369 U.S. 186, 192 (1962) ("It is primarily the continued application of the 1901 Apportionment Act to this shifted and enlarged voting population which gives rise to the

---

[3] The underlying facts of the case are not recited in the Court's opinion but are rather contained in the district court's decision. *Harper v. Virginia State Board of Elections*, 240 F.Supp. 270, 271 (E.D.Va. 1964).

present controversy."); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963) (the method of electing legislative representatives had a concrete effect on every election held); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 147-148 (1963) (involved the application of a statute through actual deportation proceedings).

B. There Is No Conflict Among The Circuit Courts of Appeals Concerning The Application Of The Statute Of Limitations To Facial Challenges Asserting A Taking Of Property Without Compensation.

It is well-settled in the Ninth Circuit that the statute of limitations bars an untimely facial challenge to an ordinance on the ground that the enactment constitutes a taking of property without compensation and that the limitations period begins to run from the date the ordinance is enacted. Moreover, the approach of the Ninth Circuit on this issue does not conflict with decisions of other circuits.

The Ninth Circuit has repeatedly held that the bar of a statute of limitations is applicable to a facial challenge to a "takings" claim and that the limitations period runs from enactment of the ordinance. *De Anza Properties X, Ltd. v. County of Santa Cruz*, 936 F.2d 1084 (9th Cir. 1991); *Azul Pacifico v. City of Los Angeles*, 973 F.2d 704 (9th Cir. 1992), *cert. denied*, 506 U.S. 1081; *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680 (9th Cir. 1993), *cert. denied*, 503 U.S. 1093 (1993). In *Levald, supra*, that court cogently expressed the compelling reasons why this is so in the following terms:

> "Levald argues that because in other contexts the Supreme Court has allowed challenges to statutes long after they were enacted, Levald should be allowed to bring an action challenging the enactment of a statute as a taking without just compensation at any point. This argument misapprehends the differences between a statute that effects a taking and a statute that inflicts some other kind of harm. In other contexts, the harm inflicted by the statute is continuing, or does not occur until the statute is enforced - in other words, until it is applied. In the takings context, the basis of a facial challenge is that the very enactment of the statute has reduced the value of the property or has effected a transfer of a property interest. This is a single harm, measurable and compensable when the statute is passed. Thus, it is not inconsistent to say that different rules adhere in the facial takings context and other contexts." 998 F.2d at 688.

Contrary to petitioners' assertion to the contrary,[4] the same approach has been followed in both the Fourth and Sixth Circuits. In *National Advertising Company v. City of Raleigh*, 947 F.2d 1158 (4th Cir. 1991), the Fourth Circuit applied the statute of limitations to a claim that a city ordinance restricting off-premises outdoor advertising signs resulted in a taking. Contending that it suffered no injury until the expiration of an amortization period (after which

---

[4] Petitioners' quote from *Kuhnle Brothers, Inc. v. County of Geauga*, 103 F.2d 516, 522 (6th Cir. 1997) on page 8 of their Petition is taken from the court's discussion of Kuhnle's claim for deprivation of a liberty interest (substantive due process), not the court's discussion of the takings claim.

the ordinance required removal of its signs), National argued that the limitations period ran from the end of the amortization period rather than the adoption of the ordinance. The Fourth Circuit rejected that argument, stating:

> "National's cause of action arose when the ordinance was enacted because it was then, if at all, that National suffered the regulatory interference with the primary uses of its property. . . . [¶][¶] We hold only that the injury suffered by National, an injury that might or might not rise to the level of a taking, occurred upon enactment of the ordinance at issue." *Id.* at 1163-1164.

The Sixth Circuit's approach accords with that of the Fourth and Ninth Circuits. In *Kuhnle Brothers, Inc. v. County of Geauga*, 103 F.3d 516 (6th Cir. 1997), a trucking firm challenged a county resolution that prohibited the use of certain streets for truck traffic. The firm filed an action claiming, *inter alia*, that the resolution "constituted an invalid taking of property without just compensation." *Id.* at 518-519. That action was filed more than two years after the adoption of the resolution but less than two years after the county ceased enforcing the restriction (two years being the applicable limitations period). In an attempt to avoid the bar of the statute of limitations, the firm argued that enforcement of the resolution was a "continuing violation" and that the limitations period did not run until the date the county no longer enforced the restriction. *Id.* at 520. The court rejected that argument. Citing *Levald*, *supra*, the court stated that if the resolution "did, in fact, 'take' any property interests . . . that taking occurred when the resolution was enacted." *Id.* at 521. Therefore, treating the

claim as a facial challenge, the court held that the statute of limitations ran from the date of enactment and that the takings claim was time barred. *Id.*

C. The Statute Of Limitations Bars Relief Even Though Petitioners Seek Declaratory And Injunctive Relief Rather Than Damages.

The petitioners contend that, because they seek declaratory and injunctive relief rather than damages, the statute of limitations does not apply to their facial challenge. To the contrary, it is well-settled that the nature of the remedy sought does not preclude the application of the statute of limitations. Where an action for damages, as well as for declaratory and injunctive relief, will lie, or where "the suit is brought in aid of a legal right," the equitable remedy is barred "if the legal right is barred by the local statute of limitations." *Russell v. Todd*, 309 U.S. 280, 289 (1940). See also *Cope v. Anderson*, 331 U.S. 461 (1947). As the Ninth Circuit stated in the takings context, "[w]hether styled as a claim for damages or one for declaratory relief, the facial challenge is time barred." *Levald,* 998 F.2d at 688-689.

CONCLUSION

The Ninth Circuit did not err in applying the statute of limitations to petitioners' facial challenge to the City's ordinance that is the subject of this action. For the reasons stated above, the case does not meet the criteria for issuance of a writ of certiorari, and the petition for a writ should be denied.

Dated: October 6, 1997

Respectfully submitted,

JAMES K. HAHN, City Attorney
CLAUDIA McGEE HENRY,
Senior Assistant City Attorney
ANTHONY SAUL ALPERIN,*
Assistant City Attorney
**Counsel of Record*
SHARON SIEDORF CARDENAS,
Assistant City Attorney

LOS ANGELES CITY
ATTORNEY'S OFFICE

Attorneys for Respondent
CITY OF LOS ANGELES